FILE COPY.

IN THE

UNITED STATES SUPREME COURT.

No. 258.

Office Supreme Court, U. S.
FILED.
MAR 11 1907
JAMES H. McKENNEY,
CLERK.

AMANDA M. S. WHITFIELD (Plaintiff in Error),
Petitioner,

vs.

ÆTNA LIFE INSURANCE COMPANY, of Hartford, Connecticut (Defendant in Error),
Respondent.

Upon Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

STATEMENT AND BRIEF FOR THE ÆTNA LIFE INSURANCE COMPANY, RESPONDENT.

JONES, JONES & HOCKER,
BOYLE, GUTHRIE & SMITH,
Attorneys for Respondent.

J. J. DARLINGTON,
Of Counsel.

St. Louis Law Printing Co., 311-315 Locust. Bell, Main 1819; Kinloch, Central 906 L.

IN THE

UNITED STATES SUPREME COURT.

No. 258.

AMANDA M. S. WHITFIELD (Plaintiff in Error),
Petitioner,

vs.

ÆTNA LIFE INSURANCE COMPANY, of Hartford, Connecticut (Defendant in Error),
Respondent.

Upon Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

EXCEPTIONS TO STATEMENT OF PETITIONER.

We desire to except to the statement of the case as prepared by the plaintiff in error (petitioner here) in the following particulars:

On page 2, of the brief for the petitioner, is the statement:

"The company defended upon the sole ground that death occurred by suicide and under the terms of the policy **the recovery was limited to one-tenth of the amount of the insurance.**"

As hereinafter pointed out, this is a very inaccurate and misleading statement of the respondent's position.

Again on page 2 is the statement:

"The trial court adopted the view that such limitation was valid."

As hereinafter pointed out, the trial court did not entertain such view.

On page 3 is the statement:

"Both the trial and appellate courts held that the statute only meant that suicide could not be a **complete** defence, and that it was lawful for the policy to provide for a **partial** defence to the extent of **reducing** the amount of recovery in case of suicide."

As hereinafter pointed out, neither the trial court nor the appellate court so held, and this statement is inaccurate and misleading.

On page 3 is the statement:

"The Circuit Court of Appeals rejected the doctrine of these cases because it was of the opinion that in these latter cases there was no **particular discussion** of that precise point, but said that while the question was **expressly decided** by the St. Louis Court of Appeals, yet the opinion was not binding", etc.

An examination of the opinion of the Circuit Court of Appeals (copied in full on page 29 of the record) will show that the Circuit Court of Appeals made no such statement. What the Court of Appeals said of the Federal cases was that they "contained no statement, discussion or decision of the question now under consideration"—not that there was "no particular discussion of the precise point" (Record 33). What it said of the Keller case was: "It is doubtful whether the policy sued on in the other case is properly **distinguishable** from those **just described**, but, **if** it is, the case **tends** to sustain the plaintiff's contention" (page 33).

So also the question for decision is not, as stated on page 5 of Petitioner's Brief "whether the recovery should be limited to one-tenth of the insurance", but is: "Shall the insurance, because of the statute, be increased to ten times what the parties agreed it should be?"

STATEMENT OF THE CASE BY RESPONDENT.

This is an action brought by Amanda M. S. Whitfield, widow of James Whitefield, deceased (plaintiff in error), petitioner, against the Ætna Life Insurance Company of Hartford, Connecticut, upon a policy of accident insurance issued by that company to her deceased husband for the sum of five thousand dollars.

THE PETITION.

The petition alleges the necessary jurisdictional facts, the issuance and delivery of the policy in consideration of the premium named therein, $6.25, and sets out the policy in *haec verba*, (Rec. 3 to 8, inclusive), that the policy was in full force and effect at the time of the death of the insured; that on April 7, 1902, while said policy was in force, at Kansas City, Missouri, James Whitfield **died from bodily injuries effected through external, violent and accidental means, and by a pistol shot;** that notice and proofs were given, and further proof waived, and that defendant offered to pay plaintiff the sum of five hundred dollars as the full amount due by virtue of Section 5 of the policy, and refused to pay any further sum, and asked judgment for five thousand dollars and interest.

Section 5 of the **policy,** so referred to in the petition, is as follows:

"In event of death, loss of limb or sight, or disability due to **injuries intentionally inflicted** upon the Insured by any other person (except assaults committed for the sole purpose of burglary or robbery), whether such other person be sane or insane, or under the influence of intoxicants or not; or due to injuries received while fighting or in a riot; or due to **injuries intentionally inflicted upon the Insured by himself;** or due to suicide, sane or insane; or due to the taking of poison, voluntarily or involuntarily, or the inhaling of any gas or vapor; or due to injuries received while under the influence of intoxicants or narcotics, then in all such **cases referred to in this paragraph, the limit of this Company's liability** shall be **one-tenth the amount otherwise payable under this policy,** anything to the contrary in this policy notwithstanding."

THE ANSWER.

The **answer admitted** the issuance and delivery of the policy as alleged and that Whitfield died while it was in force, but **denied** that Whitfield died from bodily injuries effected through external, violent and accidental means, but **admitted** that he died from bodily injuries caused by a pistol shot and alleged that his death was not caused by accident but was the result of his own act and intention and resulted from a pistol shot fired by Whitfield for the purpose of taking his own life. The answer also admitted that plaintiff was Whitfield's widow and that notice and proofs of death were furnished. The answer then proceeded as follows:

"Further answering said petition defendant alleges that the contract sued upon is a policy of accident insurance and insured the said James Whitfield against loss of time resulting from bodily injuries effected through external, violent and accidental means in a specified sum weekly during disability as well as against death resulting from bodily injuries effected through external, violent and accidental means in the **principal sum** of five thousand dollars, but further provides that if such injuries are received while insured is riding in a passenger conveyance or elevator, or on a bicycle, or in a burning building, the amount to be paid shall be double the principal sum, or $10,000; that if death is due to sunstroke or freezing, or the result of unnecessary exposure to obvious risk, or to contact with poisonous substances, or hernia, or where there is no visible mark on the body, then the amount to be paid shall be one-fifth of the principal sum, or $1,000; and further provides that in the event death is caused by **intentional injuries** inflicted by the insured or any other person, whether such person be sane or insane, or while fighting, or in a riot, **or by suicide,** sane or insane, or by poison, or by inhaling gas or vapor, or while under the influence of intoxcants or narcotics, then **the amount to be paid shall be one-tenth ($\frac{1}{10}$) of the principal sum, or $500.**

"Defendant states that said James Whitfield died from bodily injuries caused by a pistol shot intentionally fired by himself for the purpose thereby of taking his own life; that the cause of the death of said Whitfield was suicide."

"Defendant states that under the provisions of said policy it is liable to plaintiff in the sum of $500; that this is the full

sum it contracted to pay plaintiff in the event the death of said Whitfield was caused by suicide or by intentional injuries inflicted upon himself; that it is now ready and willing and tenders the plaintiff said amount; that it has always been ready and willing to pay said sum and prior to the institution of this suit tendered said sum to plaintiff and defendant now offers to let judgment go against it for said sum of $500; and prayed that judgment be entered for plaintiff for $500 and that costs be taxed against her." (Rec. 12, 13.)

THE REPLY.

The **reply** upon which the case was tried was as follows:

"Now comes plaintiff and for reply to the answer of defendant **admits** that James Whitfield died from bodily injuries caused by a **pistol shot fired by himself** and the cause of his death was **suicide**" (Rec. 14).

THE TRIAL.

A jury was waived and the cause submitted to the Court (Judge Phillips, W. D. of Mo.) upon an agreed statement of facts (Rec. 14 and 15).

Agreed Statement of Facts.

By the agreed statement of facts it was stipulated, in brief, as follows (Rec. 14.):

1. That the plaintiff is a citizen of Missouri and was the wife and is the widow of the insured.
2. That the defendant company is incorporated in Connecticut and licensed to do business in Missouri.
3. That for the consideration named therein ($6.25) the defendant issued the policy set forth in the petition to James Whitfield in Missouri and the policy was in force at the time of Whitfield's death.
4. That while the policy was in force Whitfield "died from bodily injuries **caused** by a pistol shot **intentionally** fired by himself for the **purpose** of thereby **taking his own life**; that the cause of death of said Whitfield was **suicide**".
5. That notice and proofs of death were given by plaintiff and further proofs waived by defendant; that plaintiff demanded payment and defendant offered to pay and tendered $500 as the full amount due under Section 5 of the policy, which amount plaintiff refused.

6. That defendant maintained its tender.

7. That either party might introduce further evidence not contradictory of the stipulation, and that it should not be deemed contradictory of the Stipulation for the plaintiff to prove, if she can and desires so to do, that at the time said Whitfield killed himself he was not in condition of mind to realize what he was doing or know the consequences of his act.

Neither party introduced any further evidence and the case was tried upon the facts thus stipulated.

Upon the foregoing facts the Court declared the law to be that the plaintiff was not entitled to recover $5,000, but was only entitled to recover $500. Judgment for $500 in favor of plaintiff was accordingly rendered, from which judgment the plaintiff prosecuted error to the Circuit Court of Appeals (8th Circuit), where the judgment was affirmed, and afterwards, upon the petition of the plaintiff and the Attorney General of Missouri a writ of *certiorari* was granted by this Court.

The opinion of the trial judge, Phillips (p. 19 of the Record) is reported in 125 Fed. 269, and the opinion of the Circuit Court of Appeals (p. 29 of the Record) is reported in 144 Fed. 356.

THE POLICY.

The policy is as follows—its provisions being consecutively stated—the eliminated matter being such only as is wholly immaterial to the questions under consideration:

Principal Sum $5.000. Accident Policy. Premium $6.25.

(First Contingency)

"The Ætna Life Insurance Company, of Hartford, Conn., in consideration of $6.25 does hereby insure James Whitfield, being a Sporting Editor by occupation, in the sum of **$25 per week against loss of time** resulting from **bodily injuries** effected through **external, violent and accidental means** which shall, independently of all other causes, immediately, continuously and **wholly disable** him from prosecuting any and every kind of business pertaining to his occupation as above stated;

Or if such injuries shall not **wholly** disable the insured as above but shall disable him from the performance of **one or more** important daily duties pertaining to his occupation, or if after a period of total disability, partial disability shall follow, then the company will pay 2/5 of the above weekly indemnity, or $10 per week; (Second Contingency)

(*a*) If such injuries result in the loss of **two members,** or in the loss of the sight of **both eyes,** the insured shall be paid the **full principal sum,** or $5,000. (Third Contingency)

(*b*) If such injuries result in the loss of the **right hand,** or of either leg above the knee, the insured shall be paid **one-half** of the principal sum. or $2,500. (Fourth Contingency)

(*c*) If such injuries result in the loss of the **left hand,** or of either foot at or above the ankle, the insured shall be paid **one-fifth** of the principal sum, or $1,000. (Fifth Contingency)

(*d*) If such injuries result in the loss of **one eye,** the insured shall be paid **one-eighth** of the principal sum, or $625. (Sixth Contingency)

(*e*) If death results from accidental injuries, the beneficiary shall be paid the **full** principal sum, or $5,000. (Seventh Contingency)

(*f*) If such injuries occur on a public conveyance, or in an elevator or while riding a bicycle (not in a race) or in a burning building, the insurance previously specified is **doubled,** that is, there shall be paid

For total disability $50 per week instead of $25 per week.

For partial disability $20 per week instead of $10 per week.

For loss of two members $10,000 instead of $5,000.

For loss of right hand, etc., $5,000 instead of $2,500.

For loss of left hand, etc., $2,000 instead of $1,000.

For loss of one eye $1,250 instead of $625.

For accidental death $10,000 instead of $5,000.

(Eighth Contingency — Double Insurance)

(One-Fifth Insurance)

(4) Where death, dismemberment or disability is due to sunstroke or freezing, unnecessary exposure to obvious danger, to contact with poisonous substances, or hernia, the limit of the company's liability is **one-fifth** of the amount otherwise payable.

(One-Tenth Insurance)

(5) Where death, dismemberment or disability is due to injuries **intentional** inflicted upon the insured by any other person (except assaults by burglars and robbers) or due to injuries received while fighting or in a riot, or due to injuries **intentionally inflicted** upon the insured by himself; or due to **suicide**, or due to taking of poison, or inhaling of gas or vapor, or due to injuries while under the influence of narcotics, the limit of the company's liability shall be one-tenth of the amount otherwise payable.

THE MISSOURI STATUTE.

Section 7896 (Revised Statutes of Missouri 1899) on which which plaintiff relies, provides as follows:

"SUICIDE NO DEFENSE, WHEN.—In all suits upon policies of insurance on life hereafter issued by any company **doing business** in this State, **to a citizen of this State**, it shall be **no defense that** the insured **committed suicide, unless** it shall be shown to the satisfaction of the Court or jury trying the cause, that the insured **contemplated suicide** at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void."

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

I.

The Defense Interposed.

The defense interposed in this case is that the defendant **did not contract** as plaintiff alleges; that it agreed to pay the specific amount of insurance contracted for in its policy, for the particular casualty which caused Whitfield's death, and that it did not agree to pay the amount which plaintiff alleges it contracted to pay. The company did not interpose **suicide as a defense** to the **action,** but it did interpose as a **defense to the petition** that it had **contracted** with respect to injuries intentionally inflicted by the insured resulting in death, **differently than alleged in the petition.** It pleaded that it **contracted to pay only $500** (and not $5,000) in the event of death resulting from suicide, or from intentional injuries, and that the insured died from suicide, or from intentional injuries, and therefore that it was liable only **as it contracted** and not **as plaintiff alleged it contracted.** In other words, the **contract actually made** is interposed as a **defense to the contract as pleaded,** and not the act of **suicide,** as a defense to the policy.

The cause of action in the petition is a claim for $5,000 for death "from bodily injuries effected through external, violent and accidental means and by a pistol shot". It is not alleged that the insured killed himself, or whether he did so intentionally or otherwise. The policy provides that in event of death due to injuries intentionally inflicted upon insured by himself; or due to suicide, defendant's liability shall be **one-tenth** of the amount otherwise payable under the policy, or **the sum of $500.** The defendant, to avail itself of the defense that it had contracted for a specific lesser amount of insurance in case of intentionally inflicted injuries and in case of death

resulting from such injuries (or suicide), was compelled to plead that the death was caused by such injuries and suicide. This plea was interposed **not for the purpose of barring a recovery on the policy,** *i. e.*, defending against the policy, but **to show that this particular death** was from a cause for which, by express agreement, **it was liable only for $500,** instead of $5,000, as plaintiff alleged in the petition, and after doing this, the answer **admits liability** under the policy for the death so occasioned by intentional self-inflicted injuries (or suicide) for $500, and **states that this is the full amount of insurance contracted for,** where death results from such cause, and that the defendant is ready and willing, and has been ready and willing, to pay that amount. The defendant therefore **admits its liability** under the policy for death by self-inflicted means, or by suicide, but pleads the **specific amount of insurance contracted for** ($500) as the extent of its liability under the policy, in **defense** of the **claim asserted by plaintiff** that such liability is **$5,000.** Under the pleadings therefore, the **defense** is not that the act of suicide is not within the **contract actually made,** but the defense is that the defendant **did not contract as plaintiff asserts in her petition.**

Suicide would be a **defense** to the **policy** if it was sought **through it** to **prevent recovery** on the policy. But here the policy, recognizing suicide as a contingency with which (at least if accidental) the company must deal under the law, does so in providing for payment of a fixed substantial sum in the event of the happening of that contingency.

The cause of action in this case is an alleged violation of the contract of insurance by the insurer refusing to pay to the insured the amount which the plaintiff alleges the insurer agreed to pay. The answer to this asserted cause of action is that the defendant **did not contract as alleged by plaintiff,** but is willing to pay the sum which it contracted to pay, to-wit, $500. The **defense** is not, therefore, **suicide,** but the **contract.**

It is not a defense **against the policy**, but a defense against the **action brought** on the policy, and alleges that the liability incurred is not the liability pleaded. The defendant does not assert that it should escape, or even reduce, its liability under the contract because the insured committed suicide, but does assert that it should not be held to liability in the amount plaintiff claims, because the **contract** fixed another and a lesser amount. The contract does not undertake to **limit** liability in the event of suicide, but simply **fixes** it, as it is fixed in various other contingencies.

The statute provides, omitting what is not material, that "in all suits upon policies of insurance on life * * * it shall be **no defense** that the insured committed suicide unless", etc.

What the statute says shall be no defense in a suit upon a life policy is "**that the insured committed suicide**". The defense in this case is not "that the insured committed suicide", for this under the policy, as well as under the statute, is no defense. The defense is "that for suicides the contract provides a lesser liability than plaintiff claims".

As the defense in this case is the contracted amount of insurance, to-wit, $500 in the event of suicide, and as defendant admits that the policy covers suicide and it is liable therefor thereunder, it is clear that *prima facie* the defense made is not within the statute.

The Statute—How Construed.

The free right of contract exists in regard to insurance as it does in regard to all other matters, unless it is taken away by law or is contrary to public policy.

If the construction contended for by plaintiff in error is correct, then one of three things must be true: (*a*) either Section 7896 nullifies the right of contract in respect to insurance in case of suicide, or (*b*) the contract made (the policy) is against

the public policy created by the statute, or (*c*) the contract made (the policy) is an evasion of the letter or spirit of the statute.

The plaintiff in error takes all three of these positions, and we will consider them in the order indicated.

Does the statute abrogate the right to contract for a specific substantial amount of insurance in case of suicide?

(*a*) The statute does not abrogate the right to contract in respect to suicide when construed by the rules of construction applicable to such statutes.

At common law, suicide was a defense to an action on a policy of insurance. Section 7896 declares it shall be no defense. In the absence of any controlling statute public policy condemns a contract to insure against death by intentional self-killing and precludes a recovery on a life insurance policy where death is so caused even though the policy contains no exception covering suicide. Ritter v. Mutual Life, 169 U. S. 139.

Hence, the statute is in derogation of common law and being so must be **strictly construed.**

In Shaw v. R. R. Co., 101 U. S. 565, involving the construction of the statutes of Pennsylvania and Missouri, making bills of lading negotiable, this Court says:

"**No statute is to be construed as altering the common law, farther than the words import.** It is not to be construed as making any innovation upon the common law which it does not **fairly express.**"

Mr. Sutherland in his work on Construction of Statutes, Sec. 400, says:

"Such statutes as take away a common law right, remove or add to common law disability, or provide proceedings unknown or contrary to that law, are **strictly construed.** The Courts can not properly give force to them **beyond what is expressed by their words or is necessarily implied from what is**

expressed. * * * Statutes are not to be construed as taking away a common law right unless the intention is **manifest.**"

Mr. Endlich in his work on Interpretation of Statutes, Sec. 113, says:

"There are certain objects which the legislature is presumed not to intend; * * *. One of these presumptions is, that the legislature does not intend to make any alteration in the law beyond what it **explicitly** declares, either in express terms or by **unmistakable** implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters beyond, the law remains undisturbed. It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights or depart from the general system of law, without expressing its intention with **irresistible clearness;** and to give any such effect to general words, simply because in their widest and perhaps natural sense they have that meaning, would be to give them a meaning in which they were not really used. It is, therefore, an established rule of construction that general words and phrases, however wide and comprehensive in their literal meaning, must be construed as strictly limited to the immediate objects of the act, and as not altering the general principles of law; *i. e.*, they are to be construed as near the use and reason of the prior law as may be without violating their obvious meaning."

In the same work, Sec. 127, it is said:

"It is observable from the decisions referred to in these sections, that the presumption against an intent to alter the existing law beyond the immediate scope and object of the enactment under construction, applies as well where the existing law is statutory, as when it is promulgated by decisions. It refers to the whole system of pleading and practice to which the statute applies and of which the rule is to form a part; the latter must be construed consistently with the former. (14 Ga. 674.) And it refers equally to the common law, in whose rules and principles a statute is not presumed to evoke any change **beyond what is expressed in its provisions or fairly implied in them,** in order to give them full operation. * * * It has been expressly laid down, that statutes are not presumed to make any alteration in the common law further or otherwise, than the act does **expressly declare;** therefore, in all general matters, the law presumes the act did

not intend to evoke any alteration; for, if the Parliament had that design, they would have expressed it in the act; that the rules of the common law are not to be changed by doubtful implication. And it is probably true, that, taking one case with another, an intention on the part of the legislature to alter the statute law is sometimes presumed upon much slighter grounds than would support any such inference in the case of the common law. But **in this country, the rule has assumed the form of a dogma, that all statutes in derogation of the common law, or out of the course of the common law, are to be strictly construed.**"

Having in mind the necessary effect of this statute—the encouragment it offers to self-murder—that it gives legislative sanction and approval to the very contract which this Court has held so subversive of morality as to be within the condemnation of the law (in the absence of an enabling statute), why is not the rule of construction, for which we contend, to be applied here for the reasons suggested long ago by Judge Marshall in U. S. v. Fisher, 2 Cranch 390? This great Chief Justice said:

"Where **rights are infringed,** where **fundamental principles** are overthrown, where the **general** system of the **law** is **departed from,** the legislative intention must be expressed with **irresistible clearness** to induce a court of justice to suppose a design to effect such objects."

It is said by an eminent author (Sedgwick, p. 271):

"That with all the gross interpretation of the common law, it did contain certain grand principles, and these principles had been worked out into many practical rules, both of primary rights and procedure, which protected personal rights, rights of property, of life, of liberty, of body, and limb, against the encroachments both of government and private individuals. This is the great glory of the common law. **Any statute which should take away or diminish these rights, should be strictly construed.**

"To this extent, the rule is in the highest degree of value, not because such statutes 'are in derogation of the common law, but because they oppose the overwhelming power of the government to the futile power of resistance of the individual, and it is the duty of the courts, under such circumstances, to

guard individuals as far as just and legal, or, in other words, to preserve the individual from having his personal rights taken away by any means that are not strictly legal'.

"All the matters here enumerated, are covered by the rules forbidding, except in clear cases (and in such it is conceded, even the formula 'in derogation', etc., should have to give way) a construction which would create a new or destroy an existing jurisdiction or remedy or give summary process, and the rule which requires a strict construction of statutes that restrict or encroach upon rights, or impose burdens upon persons or property, or confer exemptions, prejudices or powers.

"As to all other statutes changing or departing from the common law, the same rule applies as in case of statutes changing the statutory law, viz.: that the legislature is not presumed to intend any alteration beyond the immediate objects and provision of the enactment."

In R. R. Co. v. R. R. Co., 63 Fed. 775–777, the Court of Appeals for the 8th Circuit, through Judge Thayer, said:

"This **common law right** of requiring payment in advance of some customers, and of extending credit to others, has not been taken away by the interstate commerce law, unless it is taken away indirectly by the inhibition contained in the third section of the act. * * * In view of the fact that all persons and corporations are entitled at common law to determine for themselves, and on considerations that are satisfactory to themselves, for whom they will render services on credit, we are not prepared to hold that an interstate carrier subjects another carrier to an unreasonable and undue disadvantage because it exacts of that carrier the prepayment of freight on all property received from it at a given station, while it does not require charges to be paid in advance on freight received from other individuals and corporations at such stations. So far as we are aware, no complaint had been made of abuses of this character at the time the interstate commerce law was enacted, and it may be inferred that the particular wrong complained of was not within the special contemplation of Congress. **This being so, the general words of the statute ought not to be given a scope which will deprive the defendant company of an undoubted common law right, which all other individuals and corporations are still privileged to exercise and ordinarily do exercise.**"

In the light of these authorities, the construction contended for by the plaintiff in error, can be adopted only if the very words of the statute justify such construction.

If we refer to the statute, no words are found therein which abridge or take away the right to **contract** in respect to insurance in the event of death by suicide, except in so far that where life is insured, the **fact** of suicide shall **not be a defense** to the insurance. There are no words either directly or indirectly prohibiting the parties from agreeing or fixing the amount of insurance in case of suicide. On the contrary, when the legislature simply made suicide **no ground of defense**, thereby compelling the insurer **to assume the risk** of suicide, it **impliedly** left all other matters open for agreement by the parties. The legislature was depriving parties of their ordinary rights, and if it had intended to deprive them of the right to make any **agreement** with respect to suicide, or had intended that they should not contract for a limited liability in case of suicide, it is to be presumed that it would have so declared in certain and emphatic language.

And so the trial court (Judge Phillips) held, saying, in in the course of his opinion (Rec. p. 20):

"As this statute is in derogation of the **common law right of defense**, it is **not** to be **extended** beyond the **letter and spirit** of the statute. **It** does not undertake to **declare** that under an accident policy, involving a great variety of accidents resulting in death, as does the policy in question, **parties may not stipulate** for the payment of a **specified sum** in the event of death resulting from suicide. It simply declares that the **fact of** suicide shall constitute no defense to the suit. * * * **Why** parties to such a contract **may not agree** upon a stipulated amount, to be paid in case of death resulting from suicide, as well as death resulting from an accident on a railroad car, or occurring in a burning building (which, under this policy, is made double the amount of the principal liability), is not apparent. * * *

"The **only limitation** in the language of the **statute** is, that in case of death, resulting from suicide, it shall constitute **no defense** against **liability on the policy**; that is to say, it shall not **defeat a right of recovery** to the extent of the sum stipulated for in the policy. The innovation, in short, made by the statute, was to cut off a defense based upon **the fact** that the assured committed suicide, without undertaking to interfere with the **right of contract** between parties *sui juris* as

to the **extent of liability** in case of death resulting from the specific cause."

And so also the Court of Appeals treats this point, saying (Rec. 30):

"The statute abrogates a common law defense and puts a **restraint upon the freedom of contract.** This alone indicates that it should receive a **restrictive** rather than an **expansive** construction * * * and so it is to **effectuate** the **true legislative** intent that a statute in derogation of the common law or in **restraint of the freedom of contract** is held to make **no change in the law** which it does not **fairly express.** * * *

"The statute **does not say** that the amount of insurance provided for in the event of death by suicide shall not be **less than** is provided for when death results in some other way, nor that there shall be no **discrimination** of any kind against suicide as a risk. Nor is it an apt or natural way of expressing **that thought** to declare that it shall be no defense **that** the insured committed suicide and that any stipulation to the contrary shall be void * * * These considerations convince us that the statute does not abridge the **freedom of contract further** than to prevent the **elimination** of suicide from the **risks covered by any policy** to which it is applicable."

We desire to suggest to the Court that if the legislature of Missouri had intended to **nullify** the common law **right to contract** and intended to absolutely abrogate all power of parties to contract with respect to the amount at risk in case of suicide, it would have used apt words for that purpose. The legislature has merely said it shall be no defense in suits upon policies on life **that the insured committed suicide.** It has nowhere said that the contract of insurance "shall provide for the payment of a like sum in case of suicide as is provided for death through any other contingency", and we submit that the failure or omission of the legislature to indicate its intention in the words we have last suggested, or in similar words, raises a legal presumption that such was **not** its intention. Judge Sanborn, in the case of Union Central Insurance Company v. Champlin, 116 Fed. Rep. 858, *loc. cit.* 860, in construing an Act of Congress with respect to the jurisdiction of the Circuit Courts of Appeal, says:

"The answer to this argument, however, is that, while ambiguous terms and doubtful expressions in legislative acts, may, and should be, so interpreted by the Courts as to carry out the intention of the body which enacted them, when they fairly disclose that intention, yet it is the **purpose which the act itself discloses,** and that only, which may be thus enforced. The Courts may not import into a plain and unambiguous law, and give effect to a **supposed intention** or purpose of the legislative body, which is **neither expressed nor indicated** in the act. Such a course of action would pass beyond the limits of construction or interpretation, into the forbidden domain of judicial legislation. The Act of March 3, 1891, is neither ambiguous in its expressions nor doubtful in its meaning, in so far as it relates to the jurisdiction of this Court, over cases like that in hand. **If Congress intended** to confer such jurisdiction, there is **nothing in the law** which it enacted, to evidence any such intention, while the **striking omission** to express it, raises the **legal presumption** that it did not exist, and **forbids the Courts** from **importing it into the law** and giving it effect."

In U. S. v. U. P. R. R. Co., 91 U. S. 72, *loc. cit.* 83, this Court, in construing the statute, under which the bonds were issued by the Government, to aid in the construction of the Union Pacific road, in regard to the liability of the company for the interest before maturity, said:

"That the Government is expected in the first instance to pay the interest, is clear enough; for the mortgage was given to secure the repayment of the bonds, 'together with all interest thereon, which shall have been paid by the United States'. This phrase implies a prior payment by the United States, whatever may be the duty of the corporation in regard to reimbursement as subsequently defined. Besides this, when repayment is spoken of, it is understood that something has been advanced, which is to be paid back. **Apart from this, had it been the intention that the corporation itself should pay the interest as it fell due, apt words denoting such a purpose would have been used.**"

Furthermore, this statute is to be read as a **part of** the contract—and if as a part of the contract both the provisions of the statute and the provisions of the contract can be so read that **both** may stand and be **given effect,** then this construction should be adopted in prefer-

ence to a construction by which the interpolated **statutory provisions** will wipe out or destroy the other **contract** provisions. Construed as it is construed by the defendant in error, the statute means that the company shall not exempt itself absolutely from liability, but may contract for liability in such contingency for any substantial amount, large or small—and so construed, effect is given to the **statute** as well as to all parts of the **contract.** Construed, however, as it is construed by the plaintiff in error, that the company can not contract for a lesser insurance in case of suicide than the greatest amount it contracts to pay in any other contingency, the interpolated **statute** provisions wipe out absolutely the **contract** provisions so far as they relate to suicide.

Thus (if we adopt the latter construction) we have one contract provision (interpolated by statute) destroying another contract provision (created by the parties), when there is no natural inconsistency between them and when such **inconsistency** is **only created by a construction** which does violence to the natural import of the language used.

Public Policy.

(*b*) The contract pleaded by defendant is not against the public policy of the State of Missouri.

"The public policy of the Government is to be found in its statutes, and when they have not directly spoken, then in the decisions of the Courts and the constant practice of the Government officials; but **when the law-making power speaks upon a particular subject,** over which it has constitutional power to legislate, **public policy** in such a case is **what the statute enacts.**"

United States v. Freight Assn., 166 U. S. 290, 340.

As said by the Court in Baltimore R. Co. v. Voigt, 176 U. S. 498:

"The **right** of private **contract** is no small part of the liberty of the citizen, and the usual and most important function of courts of justice is rather to **maintain and enforce**

contracts, than to enable parties thereto to escape from their obligation on the pretext of **public policy** unless it **clearly appears** that they contravene public right or the public welfare."

In Hadden v. Collector, 5th Wall. 107, 111, the Court said:

"What is termed the policy of the government with reference to any **particular legislation** is generally a very **uncertain thing**, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a **ground much too unstable** upon which to rest the judgment of the Court in the **interpretation of statutes.**"

So in Scott v. Reid, 10 Peters 524–527, the Court said:

"Where the language of the act is explicit, there is great danger in **departing from the words used**, to give an effect to the law which may be **supposed** to have been **designed** by the **legislature.** * * * It is not for the Court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, **because no good reason can be assigned why they were excluded from its provisions.**"

We submit that there is nothing in the statute which indicates that it is the public policy of Missouri to limit or restrict the power to contract with respect to the amount of indemnity that shall be granted under an accident or life policy, where death ensues from suicide. It is the public policy of the State of Missouri, apparently, that the parties shall not contract so as to absolve the insurer absolutely from liability under an insurance policy in the event of suicide, but it is nowhere stated in the law that policies against suicide shall be written for $100 or $1,000 or $5,000, nor has the law said that an insurer shall be forbidden from paying a different amount in the event of death from suicide than he contracts to pay in the event of death from any other cause. The insurer is at perfect liberty to contract for the payment of a fixed or a variable amount without either a minimum or a maximum limit as to such amount; and if this is so the contract pleaded by the defendant is not violative of the public policy of Missouri.

To determine whether or not the contract pleaded by defendant violates the public policy of the State, we must first determine definitely what that public policy is.

At common law suicide was a crime punishable by disgrace and forfeiture (4th Blackstone 190). It is so regarded still in most parts of America and it is the public policy of nearly all of the States to **discourage** suicide. This Court has denied recovery by the estate of the insured upon a life insurance policy matured by deliberate self-murder, not because of a policy provision against suicide, but because public policy, in the absence of express statute, discourages suicide, and the insured should not be permitted to mature the contract by his own wrong (Ritter v. Mutual Life, 169 U. S. 139).

But Missouri by this statue, seemingly **encourages suicide** and **offers** a **bounty** therefor, payable, not out of the public funds of the State, but out of the private funds of insurance companies.

However, the public policy of a State is not to be gathered from one statute alone. Common fairness to the State requires that the existence of this further statute should be called to the attention of the Court.

Sec. 1822, R. S. Mo. 1899. "Every person deliberately **assisting another** in the commission of **self-murder** shall be deemed guilty of manslaughter in the first degree", and for this the punishment is imprisonment in the penitentiary for not less than five years (Sec. 1835). So that, suicide, still designated as self-**murder** and that it is still recognized as a wrong follows from the fact that to assist one therein is a crime punishable by imprisonment. It is clear therefore that Missouri has not set about **deliberately** to encourage her citizens to self-murder, as the insurance suicide statute would seem to indicate. She is not **deliberately** encouraging this great wrong denounced alike by the laws of God and of man since Christ came upon the earth. Her public policy is something less

heinous than this, and what this policy is should be determined rather from what she has done **deliberately** than from laws whose principal object was to provide relief in particular kinds of cases without any express intention of formulating a general public policy.

Carefully considered it would seem that her public policy is that "**the fact** that the insured committed suicide shall not be a defense to suits upon policies hereafter issued", that her public policy is that the mere **fact** of suicide shall not hereafter avoid policies of insurance upon life, and that hereafter insurance companies **must contract** with a view to suicide as a liability to be assumed, but **how** they shall contract or to what **extent** they shall assume liability in case of suicide, the **statute** has has not spoken, and from no other source can we gather the public policy of the State on this subject. In other words the public policy is that in contracting for liability in case of **death** one must not contract **against liability for suicidal death.** This seems to be the limit to which this particular statute has gone, and that the public policy of the State is not such as to require the Court to enlarge its terms by intendment seems clear in view of Section 1822 above quoted.

If the public policy of the State is only that the company shall not contract against liability in case of suicide, then the contract pleaded by defendant is not violative of that public policy, for it expressly recognizes such liability by providing indemnity in case of suicide, in a sum, which, so far from being merely nominal, is nearly one hundred times as great as the premium paid.

The subject of "public policy" was considered by the Court of Appeals in its opinion in this case (Rec. 31), and disposed of by reference to and quotation from the Ritter case (169 U. S. 154), to the effect "a contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive

of sound morality, ought never to receive the sanction of a court of justice or be made the foundation of its judgment", the Court indicates the very natural constraint which all moral men must feel in enforcing a statute, the necessary (though perhaps unintentional) effect of which is subversive of public good and sound morality, in these words:

"It hardly needs statement that a thing which is **subversive** of **sound morality** is none the less so because **sanctioned by statute,** and yet, if the statute violates no constitutional provision or principle, effect **must** be given to it and **responsibility for its enactment must rest with the legislature.** Courts, however, always avoid a construction which will render a statute subversive of sound morality, unjust or absurd, **if a more sensible construction** can be given to it; and, if its terms be such that it **must** unavoidably lead to **evil, unjust or absurd consequences,** the Courts give to it **such effect only** as is **necessarily required** by the **clear import** of its language."

No more just and temperate condemnation of a vicious statute was ever penned by a Court. The plain duty owing to humanity—man's duty to man—to so restrict the operation of this law as to lessen, if possible, the encouragement it offers to self-slaughter, could not be more emphatically stated, and yet have we here not only counsel employed by private interest ably and properly presenting his client's cause, but also the eminent Attorney General of the State voluntarily injecting the influence of his great office to secure an expansive construction of this statute to the end that suicide for profit may be further encouraged in the great State which he represents. And the Attorney General urges that the construction given to this statute by the Court of Appeals will impair existing policies containing suicide provisions like that under discussion, and thus "destroy the **benefits** and **advantages** given by a **wholesome** statutory provision". Which is to say, that, though these policyholders have agreed that in case of suicide their insurance shall only be $500, yet, because of the statute, this contract provision is void, and inasmuch as the policy-

holder is presumed to have made his contract knowing that the provision was void and acted on the faith of its invalidity and in the belief that it affected his contract so as to increase the $500 to $5,000 in case of suicide, it will be a crying injustice to him if he is not permitted to reap this "wholesome" (wholesale) advantage, albeit he contracted for the smaller amount and suicide is still wrong.

Counsel is in error in asserting (as he does at p. 11 of Petitioner's Brief) that the trial court and the Circuit Court of Appeals "denied that the statute established any substantial public policy".

Judge Phillips denied that the public policy thereby created was as counsel contended for, and says (Rec. 21):

"It is not maintable that the statute in question establishes any public policy **beyond its expression**, that suicide shall constitute no defense against liability of the company on an accident policy. * * * As the legislature has gone **no further** in the assertion of the **State policy**, the Courts ought not to undertake by mere judicial assertion to extend the operation of the statute."

The Circuit Court of Appeals in its opinion (Rec. 31) clearly indicates that it is the "legislative intent" that must control.

Nowhere, in either opinion, is there any denial that the statute creates **a** public policy, but **the** public policy for which opposing counsel contend is denied by both opinions.

Evasion.

(*c*) Nor is the contract in question an **evasion** of the statute. We have here no contract by which the insurer in the event of suicide undertakes to **return the consideration**, or merely undertakes to return a part of the consideration, and no contract by which the policy is to be **cancelled or surrendered.** The premium paid in this case was $6.25 quarterly. For this the insured was entitled to receive a variable mini-

mum of insurance in eight different and separate contingencies; among which was death by suicide, **$500**; in certain other contingencies $625, and in others **$1,000**, and in others **$2,500**, and in others **$5,000**, and in certain events, even double the principal sum, or **$10,000**, and besides, weekly indemnity, varying according to circumstances, in the sum of $10, $20, $25 and $50 per week. Here was an agreement to pay a **substantial insurance in case of suicide**, and it is no less substantial, in its essentials, because the contract provided in this instance for a payment of $500, than where in others it provides for the payment of $5,000. As compared with the premium paid for the policy, $6.25, no one will contend for a moment that the agreement to pay $500, or nearly one hundred times the premium, was such a nominal undertaking as to constitute an evasion of the duty imposed by the statute, which duty was, as heretofore pointed out, nothing more than that the insurer should assume the risk of death by suicide where it undertook or assumed the risk or liability for death, and which duty thus imposed was not that the insurer should assume a liability in case of suicide, either for a specific amount or for an amount either equal to or proportioned to the liability for death in any other manner.

The rule with regard to the evasion of the statute, from section 138 of Endlich on Statutes, cited in appellant's brief, while good, so far as it goes, is subject to certain limitations, stated by Mr. Endlich, in the section now quoted:

"**It is not evading an act to keep outside of it**, although, for instance, a beer-shop keeper, who is licensed to sell beer, only to be drank **on the premises**, evades the act, if he sells beeer to be drank on **a bench** which he provides for his customers, close to his shop; the intention making it **substantially**, and in **effect, a sale** for consumption on the **premises.** A mere sale at the window, to a person who stood on the road outside, would not be an evasion, though the buyer drank the beer immediately on receiving it, etc. (Sec. 144.)

* * * * * * *

"In all such cases, it is, in truth, rather **the particular transaction** than the statute, which is the **subject of construction.** If it is found to be **in substance within the statute,** it is not suffered to escape from the operation of the law by the disguise under which its real character is masked.

"If, on the other hand, the **substance of the transaction** is found to be **beyond the reach or outside the scope of the enactment,** the **resemblance** to that which is prohibited, or even the fact that the **latter** may, in **some instances, embrace the former,** will **not bring it within the statutes.**"

Endlich on Statutes, Sec. 145.

In Neilson v. Lagow, 12 How., p. 98, *loc. cit.* 107, Congress having passed an Act declaring that no land shall be purchased on account of the United States, except under a law authorizing such purchase, where land was purchased and conveyed to trustees, this Court said:

"If it were necessary, therefore, we should hold that the Act of Congress was not applicable to this conveyance, because by it no title to the land was purchased on account of the United States."

The rule with regard to evasion of statutes as quoted by opposing counsel from 26 Enc. of Law, page 657, is good as far as quoted, but the part of the statement of the law in that compilation which counsel omits to quote is the part which has direct bearing on the question here, and is black-typed in the following excerpt:

"To carry out effectually the purpose of a statute it must be so construed as to defeat all attempts to do or avoid in an indirect or circuitous manner that which it has prohibited or enjoined; courts must labor to suppress all subtle inventions and circumlocution by which the object and purpose of the law will be defeated. **It is, however, essential not to confound what is actually or virtually prohibited or enjoined by the language, with what is really beyond the contemplation, though it be within the policy, of the act, for it is only to the former case that the principle under consideration applies, and not to cases where, however manifest the object of the act may be, the language is not coextensive with it.**"

26 Am. & Eng. Enc. (2 Ed.), p. 675.

In the early history of this Court it was called upon to decide whether driving living cattle on foot was "transporting" them within the meaning of a statute prohibiting a citizen of the United States from "transporting over land, or otherwise, in any wagon, cart, sleigh, boat, or otherwise, any munitions of war or provisions from the United States to Canada". A majority of the Court answered in the negative. In the course of the opinion the Court says:

"It may be admitted that the **mischief is the same** whether the enemy be supplied with provisions one way or another; but this affords **no reason** for construing a penal law by equity, so as to **extend** it to **cases not within the correct and ordinary meaning** of the **expressions** of the law."

U. S. v. Sheldon, 2 Wheat. 119, 121.

While the statute under consideration in the Sheldon case was a penal statute, the statute in the case at bar is in derogation of the common law and is alike subject to the rule of strict construction—a construction not so strict as to exclude cases fairly within its intendment, but so strict as to exclude those not within its "expressed provisions or fairly implied in them".

Certainly it can not be held that when the Missouri Legislature said that "in suits on policies of life insurance it shall be no defense **that** the insured committed suicide", it fairly intended or in effect said, "in suits on policies of life insurance for $5,000 it shall be no defense **that** the insurer **only agreed to pay** $500".

The rule laid down in the Sheldon case has been followed by this Court ever since.

"We recognize the value of the rule construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. But this Court has repeatedly held that this **rule does not apply** to **instances** which are **not embraced** in the **language** of the statute, or **implied from a fair interpretation of its context.**"

U. S. v. Chase, 135 U. S. 255, 261.

If, as suggested in the above quotation, we look for the "mischief" which this statute was designed to remedy, we are confused by trying to label the contract sought to be prevented as "mischief". Manifestly the statute was designed to compel recognition by the insurance companies of suicide as a cause of death creating liability—to prevent one of the parties from absolving the other from liability in a life insurance contract in the event it was matured by suicide. The "mischief" was that insurance companies were in the habit of discouraging suicide by contracting for **no liability** in case of suicide. The legislature said that the **fact** of suicide should no longer be **a defense to the policy** even though it should be so stipulated therein. Is not this "mischief" remedied where the contract assumes liability—expressly contracts to pay a fixed sum in case of liability? Counsel for plaintiff would say so if the contract was to pay $5,000 in case of suicide, for that is all he sues for. Does not the same result follow where the amount is $500—and if not, why not? It surely does if $500 is a substantial sum, and certainly it can not be otherwise considered in view of the amount of the premium, $6.25. Indeed, the entire question of evasion is disposed of when it is once determined that $500 is a substantial sum. It was held to be a substantial sum both by the trial court (Rec. 22) and the Court of Appeals (Rec. 33). For the purposes of argument on this point we concede that if the insurance granted for suicide was merely nominal, $1.00 or $10, on the premiums paid, or the reserve on the policy (which is only a part of the premiums), it would amount to an evasion of the statute.

In disposing of this point the Court of Appeals said (Rec. 33):

"But it is said that if this be so the statute can be **evaded** and its purpose defeated by providing for the payment of some **inconsiderable sum,** such as one dollar, in the event of suicide. **We think otherwise.** That would be an indirect but **substantial elimination** of suicide from the risks

covered by the policy and would be **as much within the inhibition of the statute** as would be a stipulation directly declaring suicide to be a defense. We do not doubt that any **policy** falling within the operation of the statute **must provide substantial insurance** against suicide, but beyond this the freedom of contract is not affected."

II.

DISCRIMINATION against suicide is not prohibited by the Missouri Statute.

A policy of insurance is a contract. Like all other written contracts its terms are to be ascertained from the instrument evidencing it and the applicatory statutes, the provisions of which are considered by implication a part of the contract. Contract provisions violative of such statutes are nugatory. This principle is conceded and is constantly borne in mind throughout this discussion.

The policy sued on is of the class known as accident policies. Its primary object as shown by its provisions is to indemnify the insured by weekly indemnity against loss of time resulting from bodily injuries inflicted through external, violent and **accidental** means. The extent of this indemnity is variable, accordingly as the disability shall be total or partial, and depending upon the place where the injury happened.

Collateral to this primary object, the payment of weekly indemnity, certain gross payments are provided to be made in cases where the injury is the cause of the permanent loss of certain bodily members, as the hand, foot, the eye, in which cases certain proportions of the principal sum of insurance are payable. Under such circumstances the permanent nature of the injury requires that payment of a gross sum be made in lieu of weekly indemnity.

In cases of accidental death, payment of weekly indemnity is, of course, impracticable, so payment is provided for in gross. For death by accident (generally) the payment of the

principal sum, or $5,000, is provided. Where death results from particular accidents or under certain circumstances, as while the insured is a **passenger** upon a public conveyance, it is provided that payment of double the principal sum, or **$10,000,** shall be made. Again, where death results under certain other circumstances, as from **sunstroke,** or **freezing,** one-fifth of the principal sum, or **$1,000,** is provided to be paid. And again, where death results from injuries **intentionally inflicted** by some other person, or received while in a **riot or fighting,** or while under the influence of **intoxicants,** or **narcotics,** or from **suicide,** one-tenth of the principal sum, or $500, shall be payable.

Where the policy insures against death generally, or against death arising in a particular manner (and the manner of death so covered includes death by suicide), the Missouri statute abolishes the **defense** of suicide. The question for determination, therefore, is whether the **defense** in this case is the (**fact** of) suicide, or whether the defense is that the defendant **did not agree,** as plaintiff alleges it agreed, to-wit, to pay **$5,000,** but did agree to pay **$500** under the policy sued on.

The statute does not undertake to abolish suicide as a **legitimate subject of contract.** It merely prevents the enforcement of a **contract provision for forfeiture** in case of suicide. Unlike, under an ordinary life policy, the insured under this policy was not insured for a **certain,** definite and fixed **sum,** payable upon death, but was guaranteed the payment of a weekly indemnity in case of disability and a **gross** but **variable** sum in case of death from accident, the amount depending upon the character of the accident or the manner and circumstances under which it occurred. It was not a contract to pay $5,000, because, under the terms of the policy, $10,000 might be paid, or $1,000 or $500, depending upon circumstances.

It will be observed that the amounts payable under the varying circumstances stated in the policy are **lessened** according to the **probable personal contribution** to the causes of death **by the insured.**

For example, death or injury while a **passenger** upon a public conveyance has very little probability of causal contribution on the part of the insured. In such cases $10,000 is payable. So, too, where the insured is killed in a **burning building.** In such cases there is practically no room for the act of the insured to either cause or avert injury. On the other hand, disability or death by **sunstroke or freezing** has a certain element of exposure (to either excessive heat or excesive cold) associated with it. So, also, the **unnecessary exposure to obvious danger,** in which case the extent of liability is one-fifth of the principal sum, or $1,000.

In those cases where one-tenth of the principal sum, or $500, is payable, practically all of the circumstances have **largely predominant** in them the **element of personal volition,** such as injuries **intentionally inflicted** by others, except where done for the purpose of robbery or burglary (recognizing the probable inability of the insured to forearm or protect himself, and hence the exception), injuries due to **fighting,** injuries **intentionally** inflicted by the insured upon himself, injuries received while under the influence of **intoxicants** or **narcotics,** and **suicide.**

So that it clearly appears that suicide is not made a **defense** to an action on the policy, but is merely made the **subject of rational contractual discrimination,** and the policy **recognizes suicide** as a result **creating liability,** and **insures against suicide,** but the amount of insurance against suicide is not $10,000 nor $5,000 or $1,000, but $500. Just so, the policy recognizes liability for death from sunstroke for $1,000 and not for $5,000.

Nor can it with reason be said that the suicide provision diminishes the insurance. The insurance against suicide is at

no time more than $500. The insurance is not $5,000 subject to be diminished by suicide to $500. The insured under the contract was indemnified against certain results caused in certain ways—the amount of insurance varying accordingly.

Assume yourself insured under such a policy, what is the amount of your insurance? Roughly speaking you say $5,000, because the accident most likely to cause death would result in a $5,000 indemnity to your estate, but a closer examination of the contract discloses that obviously this is not so. You are really insured for various sums, $10,000 in some instances and from this varying down to $500, according to the nature of the accidents that may befall you.

Nor can it be said that this provision is a subterfuge or an attempted evasion of the terms of the statute. It is founded on every principle of rational discrimination. The statute is in derogation of common right, the right of freedom of contract. Its purpose was to prevent **forfeitures,** to prevent contract provisions against **any liability.** The legislature and the Courts have said to the insurance companies, "you have insured against accidents—in some cases suicide is an accident. Where you are otherwise liable for suicide you must not provide that the insurance shall be **forfeited** by the fact of suicide". The legislature has never said that all suicides are accidents or that all policies of accident insurance must pay for suicides. It did not say and it did not intend to say, "whenever you insure a citizen of Missouri against disability or death resulting from accident, you may insure him in the same policy for $10,000 in case he is killed while a passenger upon a car, and for $5,000 in case he is run over by one on the street, and for $1,000 in case he dies from sunstroke, but in case he kills himself you must insure him for $5,000, and no more and no less". Yet this, in its last analysis, is what plaintiff's contention comes to.

If the right still exists in the insurer to discriminate in the amount of insurance upon the basis of the cause of death, every possible reason pleads for it in the case of suicide. Suicide is always a fraud in result; it is often a fraud in purpose.

The legislature, in its wisdom, has decreed that it shall not be a validating cause for **avoiding** or forfeiting the contract, that it shall not be a defense to the liability under the policy, but it has not undertaken to eliminate suicide as a **subject of honest, legitimate discrimination,** which alone is what is sought to be done by the policy in this case.

Opposing counsel contends, however, that to uphold the defendant's position is to permit suicide to become **some** defense, or a **partial** defense, while the statute says suicide shall be **no** defense, and cites numerous authorities holding that the word "defense" may include a partial as well as a total defense. So it may. The meaning of any word in any case must be determined from the context, and it is by reference to the context that we must determine the meaning of the word in this instance. As "the same words may require a different construction when used in different documents" (187 U. S. 201), so also the same words may require a different construction when used in different statutes. "Identity of words is not decisive of identity of meaning when they are used in different connections for different purposes." When the statute says "in all suits on policies * * * it shall be no defense that the insured committed suicide", it meant that something should not constitute a defense. What was that something? Clearly "that suicide" *i. e.*, "the fact of suicide" should not constitute a defense. But should not constitute a defense to what?—to the suit brought?—or to the liability on the policy?

It clearly means that the fact of suicide shall not constitute a defense to the liability on the policy. It clearly does not

mean that suicide shall constitute no defense to any suit brought by an insured regardless of the policy, for if this were so the claimant might bring suit for $10,000 when the policy only insured for $1,000. But, in substance, this is the final conclusion that plaintiff's contention leads to, for here he has brought a suit for $5,000 when the contract only pretends to insure against death by suicide in the sum of $500, and there is nearly as much reason for suing for $20,000 or $10,000 as there is for $5,000. And on page 18 of his brief counsel boldly takes the position that "the suit might have been brought for that amount ($10,000), but the reasonable construction was adopted by the pleader" and only $5,000 sued for. It can not be that a right of action (at law) exists on a specific contract obligation and the amount of recovery be variable "accordingly as the pleader may adopt a reasonable or unreasonable construction". We think that this statement by counsel demonstrates the utter instability of his position, for if he is right and this policy had provided $100,000 as the specific amount of insurance payable if the insured should be killed by dynamite while saying his prayers in St. Peters at Rome as the single instance and circumstance in which that sum was payable, plaintiff would still be entitled to recover $100,000 although the insured intentionally suicided while Sporting Editor of the Star at Kansas City, Missouri.

Of counsel's position on this point the trial court said (Rec. 20):

"To say that when the defendant insists that on the face of the very contract sued on its liability in case of suicide is limited to $500, it is some defense and therefore in contravention of the term 'it shall be no defense', is, with all due respect, to juggle with mere words without regard to meaning. The term 'it shall be no defense' is grammatically the equivalent of 'it shall not be a defense'. It means no more and no less. In law it means that **the given fact of** death by suicide shall not bar an action on the policy. * * * Looking at the language of the statute, and taken in its legal technical sense, in my humble opinion, nothing more was intended than

that, **in view** of the fact that insurance companies under like policies **had successfully interposed as a complete defense** against any liability **that the insured** had **taken his own** life, hereafter **no such defense** shall avail to defeat a recovery. As the legislature has gone no further in the assertion of the State policy **the Courts ought not to undertake by mere judicial assertion to extend the operation of the statute.**"

We submit that this, too, is the substance and effect of the two Federal cases (Berry and Jarmon) cited by petitioner.

When this case came before the Court of Appeals counsel again urged that the defense here was inhibited by the statute, but his contention was disposed of by the following most convincing reasoning:

"In the absence of the statute" (says the Court of Appeals, Rec. 32), "an insured suicide while sane avoids his insurance, not **partially**, but **completely**, and, under the qualifying clause of the statute, that is still the effect of self-destruction, if it was contemplated by the insured at the time he made the application for the policy. Thus **the** defense which the statute is **primarily** designed to abrogate, as also **the one which it still sanctions**, is a **complete** and not a **partial** one. Moreover, we think it is altogether a **mistaken use** of the word defense to say that a policy which provides for insurance against death by one or more means in a specified amount, and against death by another means in a lesser amount, **makes death by the latter means a defense, partial or otherwise, to an action on the policy.** On the contrary, such a policy **accepts** as a **risk** death by the latter means, and in the event of its occurrence **gives a right of action** against the insurer."

All that the defendant urges as a defense is that the contract, as made, be enforced, and this not as a defense to its **liability on the policy**, but as a defense to the plaintiff's misconception of its liability.

CASES CITED BY OPPOSING COUNSEL.

Logan Case.

Counsel for plaintiff have plainly misconceived the scope and meaning of the decision and opinion of the Supreme Court of Missouri, in the Logan case (Logan v. Fid. & Cas. Co., 146 Mo. 114), and one is very apt to be misled unless the law, as previously decided, is constantly borne in mind and if the limitations of the language of the opinion in the Logan case are overlooked.

Long before the Logan case was decided it was held by this Court that **suicide** by an **insane man** was an **accident** and that for death so caused the insurer was liable on a policy insuring against death by external, violent and accidental means (Accident Ins. Co. v. Crandall, 120 U. S. 527, 533, 534).

In the Crandall case this Court said:

"No one doubts that hanging is a violent means of death. As it affects the body from without it is external and, according to the decisions as to suicide under policies of life insurance, before referred to, it can not **when done by an insane person,** be held to be other than **accidental.**"

And that this is the law generally is held in the following cases:

Fid. & Cas. Co. v. Wiese, 182 Ill. 498;
Grand Lodge v. Wieting, 162 Ill. 408, 419.

It has never been held in Missouri, or any other place, that suicide **by a sane person** is an accident. Quite the contrary is the law. The very definition of accidental injury—"one that happens without the concurrence of the will of the insured" (Richards on Ins., Sec. 190)—precludes intentional suicide by a sane person.

"Self-destruction is **not** classed as an **accident** except it appears that the suicide was unconscious of the act or of the physical effect thereof, or was driven to the commission of the

deed by an insane impulse which he had not the the power to resist. * * * **If he (the insured) committed suicide while sane his death could not be deemed accidental.**"

Fid. & Cas. Co. v. Wiese, 182 Ill. 498.

When the legislature of Missouri enacted the suicide statute it was expressly confined in its operation to "policies of insurance on life". The contention of counsel for defendant in the Logan case was that by the expression "insurance on life" the legislature differentiated between life insurance (generally) and accident insurance (or policies, which insured life incidentally, or only against death caused in a particular manner, *i. e.*, by accident). This contention, however, was repudiated by the Court in the Logan case, and the statute held to be applicable to policies of accident insurance as well as to policies of insurance on life, because, forsooth, a policy which insured against death by accident, was, to that extent, "insurance on life", and therefore came within the letter and spirit of the statute; and it being **conceded in that case** that if the statute was applicable, **the insurer was liable,** judgment against the company was affirmed. In other words, it was **expressly admitted** in the Logan case that the death was **accidental** (*i. e.*, of necessity, that the suicide was insane, otherwise it could not have been accidental), and the defendant having made this concession—having admitted liability if the statute was applicable to an accident policy, the **only question** that the Court could pass upon, or pretended to pass upon, was **whether the statute was applicable to accident policies.** The Court held that the statute was applicable to such policies, and whatever may be thought of the reasoning of that opinion and decision, inasmuch as it is a construction of a State statute by the highest Court of the State, the trial court was, and this Court is, bound to give effect to and follow that construction as the law of the State, which the Federal courts are in duty bound to administer.

We submit, however, that this Court is not required to do more than follow the construction given to this statute by the State Court, and that upon the questions: (1) whether the facts in this record bring this case within the statute, and (2) whether the statute is susceptible of such construction as will make the insurer liable under an accident policy for the **suicide of a sane man,** are totally different questions from the sole and only question decided in the Logan case, which was whether the statute was applicable to the policy there in controversy. Moreover, upon these questions, which were not passed upon in the Logan case, the defendant should have, and is entitled to have, the independent judgment of this Court.

As was said by this Court in Hotel Company v. Jones, 193 U. S. 532, 544:

"As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute **independent** tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be **a dereliction of their duty** not to exercise an independent judgment **in cases not foreclosed** by previous adjudication."

In the Logan case the Court held that the statute was applicable to accident policies and, this being so, it was **conceded by the parties** that **if** the statute was applicable, the **defendant was liable.**

Here the question is: The statute being applicable to accident policies, (1) does it create liability for **suicide by a sane man,** and (2) does the statute limit the right of parties to contract in the same policy for one sum in case of death by suicide and for other sums in case of accidental death occasioned otherwise than by suicide?

The first question stated above was conceded in the Logan case, and hence could not be, and was not, decided; and the second question was not discussed by counsel or the Court and was not decided or referred to in the opinion, and could not

be, for that was a policy which provided for **no liability** in case of suicide, whereas the policy in this case provides for **some liability.**

That there may be no question as to just what was before the Court for decision, and just what was in fact decided, in the Logan case, note the following excerpts from that opinion:

"During the progress of the introduction of the defendant's testimony in the court below, the **trial was abruptly terminated,** by this announcement on the part of the counsel for the defendant: 'We want this case to go up on **the** question as to whether or not the suicide statute makes suicide a defense in a case of this kind and **applies to a policy such as this,** and **if so,** then the jury should be instructed to **find for the plaintiff,** and (that) there may not be any question upon that point, and for the purpose and in order to have the matter clear, we withdraw all objections to the proof of death, and admit, for the purpose of this trial, that the proofs of death were furnished. It is a question we are all interested in, and it is a question that ought to be decided both for the company and for the assured.' To which announcement the Court then replied: 'Your position is that **if** section 5855 of the statute **applies to this kind of a policy,** then, **under the testimony in this case, the plaintiff is entitled to recover,** otherwise not.' To which Mr. Warner of counsel for defendant responded **'that is it precisely.** That narrows it down so that the case will be stripped of all technicalities as to evidence' " (pp. 119 and 120).

The Supreme Court says:

"Accepting **the issue of law** tendered by the defendant's counsel, the Court instructed the jury to return a verdict for the full amount of the policy with interest. From the judgment rendered upon the verdict returned in obedience to the Court's instruction, after the usual motions and preliminaries, defendant has prosecuted its appeal to this Court, presenting and discussing here **but the one question:** Is suicide in this State a valid defense to an action upon a policy of accident insurance **such as the one in controversy,** where it is not shown that the insured contemplated suicide at the time he made his application for the policy (and **it being admitted** that the assured afterwards came to his death from external, violent and **accidental means)?** (p. 120).

'Insurance on life' (says the Court) 'includes **all policies** of insurance in which the payment of the insurance money is

contingent on loss of life. **The policy in controversy** certainly corresponds to that definition, and **must be held to be subject to the provisions of Section 5855.** The judgment of the Circuit Court will be affirmed' " (p. 126).

So that it is clear that the only point attempted to be ruled in the Logan case, the only point properly before the Court for decision—the only point in fact decided was—that **the suicide section** (5855) **was applicable to the policy in controversy.** Here, not only is there a very different policy in controversy, but the law there decided is conceded to be the law, and the questions here for decision, *i. e.* (1), whether the statute makes the company liable on an **accident** policy for suicide by a **sane man** when in the absence of such statute suicide never was and never can be an accident; and (2) whether a contract for limited liability in case of suicide, accidental or otherwise, is prohibited by the statute, were neither discussed, considered nor decided in the Logan case.

The scope and effect of the decision and opinion in the Logan case is succinctly stated by Judge Van Devanter in the opinion of the Court of Appeals in this case (144 Fed. 356—Rec. 33), Judge Van Devanter says:

"But that our reference to that case may not be misunderstood, it may be properly observed that we do not understand it as holding that, by reason of the statute, **every** policy of insurance on life, issued by a company doing business in Missouri to a citizen of that State, covers death by suicide, **irrespective of the scope and character of the policy.** To illustrate, we do not understand it as holding that the effect of the statute is, that an insurance against **death** resulting from a **particular disease,** or from the hazards of a **particular employment,** or **mode of travel,** is **also** an insurance against death by **suicide.** Rightly considered, the holding in this respect is **nothing more** than that the **statute is applicable** to insurance against loss of life through **external, violent** and **accidental means,** because **this,** as was held in Accident Ins. Co. v. Crandall, 120 U. S. 527, 533, 534, **includes suicide by one who is insane.** That this is so is shown, as we think, by the Court's statement (p. 120) of the **sole question** presented for decision, viz.: 'Is suicide in this State a valid defense to an action upon

a policy of insurance issued by an accident insurance company, containing provisions such as the one in controversy, where it is not shown that the insured contemplated suicide at the time he made his application **(and it being admitted that the assured afterwards came to his death from external, violent and accidental means)?'** And by that portion of the opinion (p. 123) in which it is said: 'When a policy covers loss of life from external, violent and accidental means alone, why is it not insurance on life? Such a provision incorporated in a general life policy admittedly would be insurance on life, then why less insurance on life because not coupled with provisions covering loss of life from unusual or natural causes as well? If one holds a general life policy and an accident policy, and is killed by lightning, or commits suicide, **so that he may be said to have died by accidental means,** both the companies should pay, and the stipulation **against liability** in the event of suicide in the policies should be no more a defense against the suit upon the accident policy, providing against death from accidental causes, than against the policy which goes further and covers death from other causes as well.'

"But" says the Circuit Court of Appeals, "the question upon **this** record is **not solved** by **ascertaining** that the **statute is applicable** to the policy sued upon. It must also be ascertained * * * whether it **goes further** and prevents all **discrimination** against suicide as a risk."

We submit, therefore, that the Logan case does not rule this case and that no part of the opinion in that case has any bearing on any of the questions presented by this record, and that the statement in plaintiff's brief (p. 5) that the Logan case holds that the suicide section "means that if in any form or manner there is insurance on life, then in case of suicide there is absolute liability", is wholly erroneous when that case is carefully considered.

Keller Case.

The differences between Keller v. Travelers' Association, 58 Mo. App. 557, and the case at bar, is that the Keller case construed a general **life policy,** not an **accident policy,** and in Keller's case there was **no insurance** for **any amount** in case

of suicide. The policy there simply provided that in case of suicide the defendant "should be liable for the then **net value of the policy**, per the American Experience Table of Mortality, with 4½% interest"; that is to say, the "reserve" or surplus premiums paid by the insured.

The provision is for **forfeiture** of the insurance and the **return** of the **unused portion** of the **premiums paid.** Net value or reserve is the excess of premiums paid over current cost of the insurance. Mutual Reserve v. Roth, 122 Fed. 853.

The difference between what the insured has paid and the cost of the insurance is the "net value" or "reserve" of the policy.

"To forfeit this excess which fairly belongs to the assured, and is fairly due from the company and which the latter actually has in its coffers * * * would be rank injustice. It would be taking away from the insured that which had already become substantially his property.

N. Y. L. I. Co. v. Statham, 93 U. S. 24, 34.

So that in Keller's case there was **no insurance** in case of suicide.

Again we respectfully submit that the judge writing the opinion in the Keller case was mistaken in the public policy attempted to be formulated by the statute in question. It may be conceded that that statute was an expression of the public policy of the State of Missouri, but it was not intended, as Judge Bond puts it, "to limit the **power to contract** for a **lesser liability** in case of death by suicide". The statute limits and excludes the power to contract for **no** liability, but it does not undertake to hamper or limit the right of the insurer to contract for a lesser liability in case of suicide than the liability provided in other contingencies, if by the contract **some** liability is provided for. It prohibits contracts **forfeiting** the insurance in case of suicide, but it **does not**, in terms or by implication, fix either the minimum or maximum liability of the company in case of suicide. Neither does it undertake to say that in case of

death the insurer must provide indemnity in the same amount regardless of the circumstances attending such death.

The trial court was not, nor is this Court, bound by the decision of the Missouri Court of Appeals in the Keller case, for two reasons, first the statements in the opinion are *obiter*, and, second, the Missouri Court of Appeals is not the highest Court of the State which **settles** the law of the State, but is a Court of inferior and limited jurisdiction.

First: The expressions of Judge Bond in the Keller case are wholly *obiter*. They are merely his individual views expressed incidentally in the course of the opinion, expression by which even his associates who concur in the decision, are in nowise bound. They do not rise to the dignity of a decision of the question thus discussed, for that question was not in the Keller case. The record there did not call for an opinion upon, much less a decision of, the question whether the statute permitted a contract for a lesser liability, for the contract there was for no liability—for the return of that part of the premiums paid which constitute the "net value" of the policy. There was in that case no agreement for the payment of a certain and substantial amount, as is the case here. These expressions in the opinion in the Keller case are based upon implications from the statute—they are merely individual deductions as to the public policy created by the statute rather than a construction of the language of the statute.

In Carroll v. Carroll, 16 How. 275, 14 Law Ed. 940, this Court, speaking through Mr. Justice Curtis, says:

"It must be remembered that we are bound to decide a question of local law, upon which the rights of the parties depend, as well as every other question, as we think it ought to be decided. * * * If the construction put by the Court of a State upon one of its statutes was not a matter **in judgment**, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, **an opinion** on such a question is not a decision. To make it so there must have been an **application** of the **judicial mind** to the **precise** question necessary to be de-

termined to fix the rights of the parties and decide to whom the property in contestation belonged. And therefore this Court and other courts organized under the common law has **never held itself bound** by any **part** of an **opinion**, in any case, **which was not needful** to the ascertainment of the right or title in **question between the parties.**"

This case has been followed in
Northern Bank v. Porter, 110 U. S. 615; 28 L. Ed. 261;
St. L. R. R. v. T. H. R. R., 145 U. S. 404; 36 L. Ed. 753.

Mere **general expressions** which go beyond the case may be respected, but **do not control the judgment** in a subsequent suit when the very point is presented for decision.

Cohens v. Virginia, 6 Wheat. 399.

"**Expressions** used by a State Court in construing a statute, **when other points**, and not the one at bar, were under consideration, **do not bind the Circuit Court of the United States**, and are, indeed, no precedent for the Court delivering the opinion."

Matz v. C. & A., 85 Fed. 180, 183;
Bennett v. Boggs, Fed. Cas. 1319, Bald. 60.

This Court has said it will follow the "latest **settled** adjudications" of the State Courts, but not oscillations in the process of settlement.

Gelpcke v. Dubuque, 1 Wall. 175, 205;
Leffingwell v. Warren, 67 U. S. 603.

"Where a question of this character is **well settled** by the decisions of the **highest Court** of the State, it will be followed by the United States Courts, even though it may have understood the law otherwise. They will follow the latest **settled** adjudications, but it can not be expected to follow oscillations in the process of settlement."

Myrick v. Heard, 31 Fed. 241, 243.

How can it be asserted that the questions presented here are **settled** by the Keller case, when it is manifest that the precise point here, *i. e.*, the right of the company to limit its liability in case of suicide (the amount fixed being substantial) could not arise for **decision** in the Keller case, and only arose *arguendo* in the discussion indulged in by Judge Bond in his opinion. These were mere expressions indulged in while deciding **another point**—not the point raised here.

Moreover, the question here is rather the **application** of the statute properly construed (and construed, if you will, as it was construed in the Logan case, as being applicable to this policy) **to the contract**, than a **construction of the statute.**

The Court of Appeals (8th Circuit) in Casserleigh v. Woods, 119 Fed. 308, 313, in an opinion by the late Judge Thayer, recognizing the rule that the Federal Courts are bound to follow and adopt the authoritative construction by the State Courts of its own statutes, has this to say of the **application** of such construction:

"This construction by the State is binding, as a matter of course, upon the Federal Courts, it being an authoritative construction of a local law. But we are of opinion that when it becomes necessary to **apply the statute**, as thus construed by the local Courts, **to a particular contract**, and determine upon a consideration of all its provisions, **whether it is violative of the statute**, a Federal Court is entitled to express an **independent judgment.** In the case last supposed the question is one of **general law**, rather than a statutory construction, and the decision of the Federal Court thereon ought to be something more than a mere echo of a previous decision of the same question by a Court of co-ordinate jurisdiction, although such a decision is entitled to the highest respect, and should be regarded as **persuasive authority.**"

This rule was reiterated in the case of Ottumwa v. City Water Co., 119 Fed. 315.

Far from conceding that the Keller case was "precisely in point", as counsel asserts (Petitioner's Brief, p. 6) the trial court refused to be bound by it, and the Circuit Court of Ap-

peals not only expresses the view that the opinion in the Keller case is "clearly wrong", but holds that, if it is distinguishable from the Federal cases cited and held inapplicable, it, at most, only "**tends** to sustain plaintiff's contention" (Rec. 33).

Second: The Missouri Court of Appeals is an inferior court of limited jurisdiction (Const. of Mo., Sec. VI, Art. 12) Rec. 21, 23).

It was of one branch of the very court which decided the Keller case (Missouri Court of Appeals, Kansas City Division), that Mr. Justice Brewer said:

"This case comes clearly within the line of the cases heretofore decided by this Court * * * . In the course of the various opinions that I have had occasion to express, I have stated my own views and the reasons why, in deference to the opinions of the other Judges in this district, including the Presiding Justice, I have made those decisions. In the last, or next to the last, of those cases, I stated that that would be the rule of this Court until there had been an authoritative declaration by the Supreme Court of the United States **or the Supreme Court of the State of Missouri** to the contrary. Now there is presented a decision of the **Kansas City Court of Appeals** which it is claimed enunciates views different from those announced heretofore, **and in harmony with the opinions that I personally hold,** and I am asked to reverse the line of decisions here. **That is not an authoritative exposition of the law of Missouri.** The St. Louis Court of Appeals may rule one way and the Kansas City Court of Appeals another. **There is but one authoritative expounder of the Missouri statutes** in this State, and **that is your Supreme Court,** so the petition for rehearing will be denied."

Freund v. Yaegerman, 27 Fed. 248.

Federal Courts are not bound to follow the decisions of inferior State Courts.

1st Garland & Ralston Pr., p. 661, note;
Guano Co. v. Morrison, 2 Woods 395;
Von Brocklen v. Brooklyn R. R., 5 Blatch. 379.

"The decision of the Court of Appeals (says Judge Phillips, Rec. 21) is not binding on this Court, as it is not a court of the highest jurisdiction in the State."

The Court of Appeals (8th Circuit—Rec. 33) says:

"As the St. Louis Court of Appeals, while of high repute, is not a court of last resort, **whose decisions settle the law of the State,** we must give effect to our own interpretation of the statute."

Lastly: Opposing counsel finally appeal for the application of the "harmony rule" as laid down in Burgess v. Seligman, 107 U. S. 20. To apply this rule is to concede that this Court is not bound to follow the Keller case as an authoritative interpretation of the local law. That is to say, if this Court is to follow the Missouri Court of Appeals merely from a desire to harmonize the decisions of two courts of co-ordinate jurisdiction, that it does so, not because of the impelling force of **duty** or **obligation** under the law, but from the desire to conform its decisions to the decisions of another co-ordinate tribunal in the same jurisdiction. If the harmony rule is applied, then this Court will not conform its opinion to that of the State Court of Appeals unless it is persuaded that the State Court is, or at least probably is, right in its conclusion. In applying this rule the State decision, at most, is but persuasive authority.

From this standpoint we suggest that, considered in the light of its necessary results, no more vicious decision was ever rendered by a Court. We mean no disrespect to the State Court. We refer expressly to the necessary results that flow from that decision and not to the motives that occasioned it. Of necessity, it must follow, that the adoption of the expansive construction of this statute, as announced by the State Court, inevitably tends to increase the number of suicides and the circumstance under which suicides may recover the largest amount named in the policy, and as the statute under con-

sideration necessarily encourages suicide in all cases within its letter, so also any construction which enlarges or expands its terms, to cases not strictly within its letter, necessarily increases the number of persons who will, or may, profit by its terms; and in the ratio that this liberal construction increases the possible cases that may come within the protection of the statute, such construction increases the number of persons who will, or may be, encouraged (from financial distress and despondency and a desire to protect dependents or creditors) to resort to this course for relieving themselves of life's burdens. A construction producing such results, which offers such encouragment, we feel confident, will never be adopted by the highest court of the land, and to it (as to the trial court and the Circuit Court of Appeals) the opinion of the Missouri Court of Appeals, if only persuasive authority, will not commend itself as sound in theory or benificient in results, and that the tendency of this Court will be, and should be, to confine the operation of the statute to the narrowest possible limits.

In considering the persuasive influence of this case it should be constantly borne in mind that the contract there under consideration was not an **accident** policy, but a **general life** policy, insuring against **death from any cause**, and in which not only was the premium much larger, but the premium covered, and was intended to cover, the **cost of insurance** against **death from any cause**, (that case thus presenting equitable considerations which are entirely absent in this case); and the premium in Keller's case covered, in addition to the **current cost** of general life insurance, that excess accumulation (collected during the earlier years of a life policy to offset the increasing mortality due to increasing age) known as the "reserve" or "net value", and that it was the **character of the policy** and the **amount** and **purpose** of the premium which evoked from Judge Bond the expression indi-

cating that this statute should be expansively construed. Thus he says:

"The fact that the **premium warranted** and the policy guaranteed **full insurance** in case of **death** of the insured **from any cause,** not specified in the clause set up in the defendant's answer, demonstrates that said clause was **designed** to **modify** the **liability** of the insurance company if the defendant committed suicide. It necessarily follows, if this stipulation as to **decreased liability** in the event of suicide is enforced, that it is some defense to the **OTHERWISE full liability AGREED upon in the policy.**"

In the case at bar it can not be said that the **premium,** $6.25 (fixed without regard to and intended only to cover the cost of death due to accidental casualty), **warranted** the company in paying either for death generally or death from causes not clearly of the character expressly insured against by its contract. On the contrary, the reasoning indulged in by Judge Bond, applied here, excludes liability, for, if the premium there (a general life premium), warranted full insurance in case of death from any cause, by the same token the premium here (an accident premium) would not warrant insurance against death from any cause not contemplated in fixing the premium.

Again, Judge Bond says the "policy guaranteed full insurance in case of the death of the insured from any cause", whereas here there is no guaranty of insurance in case of death from any cause, but only insurance against death caused in a particular manner.

Again, Judge Bond says that in Keller's policy the clause was "**designed** to **modify** the **liability**" of the insurance company, which can not be the case here, for there is no general liability for death generally, including death by suicide, which the clause in question could be designed to modify.

The Keller case deals with a contract, the whole scope and nature of which is so variant from the contract under consideration, that to appy the general expressions there used to the case made by this record, is to produce utter confusion

and to extend the doubtful beneficence of that case to a situation where all its underlying equities are wholly wanting.

Opposing counsel cites two Federal Court cases (Knights Templar v. Berry, 50 Fed. 511; Knights Templar v. Jarmon, 104 Fed. 638; s. c. 187 U. S. 199) as upholding his position. His contention in this respect was so conclusively answered by the Circuit Court of Appeals, that an appropriate quotation from the opinion of that Court leaves little if anything more to be said. Referring to these cases the Court of Appeals said (Rec. 33):

"The policy sued on in each attempted, in terms, **or in effect, to eliminate suicide** from the risks **covered** by it, and to provide that in the event of the death of the insured by that means, the insurer would be liable only for the **re**payment of **what it had received** in the way of assessments. Thus, instead of **accepting** suicide as a **risk**, the policy attempted to make it a **ground** for completely **avoiding** the right to **any** insurance."

In support of this conclusion, we direct the Court's attention to the provision of the policy in the Berry case (46 Fed., 439, 441). It is: "In case of self-destruction * * * **this policy shall become null and void,** * * * provided * * * this company will pay such an **amount as the member shall have paid to this company** on this policy in assessments on the same without interest"; and in the Jarmon case the provision was in precisely the same form, and is so quoted in 187 U. S. at page 200.

It will be seen, therefore, that in both of the Federal cases cited by the plaintiff, the provision was in terms and in effect that **suicide should avoid all insurance** and that the assessments should be **repaid,** this very repayment evincing that the contract was to be abrogated *ab initio, i. e.*, the insurance was avoided—eliminated in case of suicide *in toto.*

Opposing counsel contends that his view of the law is the construction "which has been adopted by the profession and

accepted by this Court''. With all due respect to counsel, I beg leave to differ with him. There has been no construction by the profession genererally, for or against his contention, and that this is so must be manifest when both the trial judge and the three Judges of the Court of Appeals decided against that construction, and this, too, without reference to the "construction by the profession'' to which counsel refers. I fear my esteemed friend has chosen to accept the kindly curbstone encouragement of friendly associates as a general professional construction. Nothing is more unreliable, as the writer of this brief has occasion to know.

IN CONCLUSION.

We submit (1) that the Logan case decides nothing that has not always been conceded in this case by counsel and by both the trial court and the Circuit Court of Appeals—merely that the statute was applicable to the policy there in controversy, which is a policy wholly different in scope and purpose from the policy in suit; (2) that the Keller case does not bind the Federal Courts, because it is the decision of an inferior court and its pertinent expressions are wholly *obiter*, and, further, as mere persuasive authority, its reasoning should not be endorsed or followed; (3) that the Federal cases relied upon were decisions concerning policies so essentially different from the policy at bar as to make the expressions used therein wholly inapplicable to this case; (4) that every reason appeals for such a restrictive construction of the statute as will confine its operation to cases clearly within its terms, and (5) that the plea of the defendant that it contracted to pay $500, and not $5,000, as alleged, is not within the letter or the spirit of the statute, and should therefore be sustained.

Respectfully submitted,

JAMES C. JONES.

JONES, JONES & HOCKER,
BOYLE, GUTHRIE & SMITH,
J. J. DARLINGTON,
Of Counsel.